

California Department of Consumer Affairs

Legal Guide U-6

SURVEY OF UNLAWFUL ADVERTISING LAW

August 1995

It is a violation of both California and federal law to disseminate an advertisement which is untrue or misleading.

The prohibition against false and deceptive advertising is broad. In applying the prohibition, courts interpret the rule to meet the ever-changing characteristics of the marketplace, and the ever-changing acts and practices of companies that merchandise property, services, and credit.

In determining whether an advertisement is deceptive, the test is whether the advertisement has the *tendency or capacity to mislead*. (Chern v. Bank of America (1976) 15 Cal.3d 866, 876 [127 Cal.Rptr. 110].) The statute does not require actual deception, only a tendency or capacity to deceive.

In applying this standard, the advertisement is viewed from the perception of the audience to whom the ad is directed. (Aronberg v. FTC (7th Cir. 1942) 132 F.2d 165, 167; Ford Motor Co. v. FTC (1941) 120 F.2d 175, 182.)

Thus, the key question in determining whether a particular advertisement is deceptive is: *Does it have the "tendency" or the "capacity" to deceive the audience to whom it is directed?*

Basic California Law

California's primary false advertising statute, Business and Professions Code Section 17500, provides in relevant part:

"It is unlawful for any person ... with intent ... to dispose of ... property ... or to perform services, ... to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, ...any statement concerning such ... property or services ... which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or

misleading"

California's prohibition against false and deceptive advertising is expressed in very general terms, and its precise definition and application to individual cases is left to law enforcement agencies and the courts. As a result, the complete definition of what constitutes a violation is found, not in the statutes or regulations, but in published reports of the court decisions in disputed cases, and in the legal texts that analyze and discuss those decisions.

What is "Advertising?"

"Advertising" has been broadly interpreted under Business and Profession Code Section 17500. Almost any representation made in any manner in connection with the sale of goods, services, or credit is "advertising." (Feather River Trailer Sales, Inc. v. Sillas (1979) 96 Cal.App.3d 234, 248-249 [158 Cal.Rptr. 26, 34-35]; Ford Dealers Association v. DMV (1982) 32 Cal.3d 347, 359 [185 Cal.Rptr. 453, 459-460].) Oral and written statements, conduct, and visual representations which are considered statements, may all be subject to the provisions of Section 17500. Statements covered include not only those disseminated widely through both the written and aural media (e.g., newspapers, radio, and television), but also those made one-to-one to an individual consumer by an advertiser or its employee. (Feather River Trailer Sales, Inc. v. Sillas, supra, 96 Cal.App.3d 234 [158 Cal.Rptr. 26]; Ford Dealers Association v. DMV, supra, 32 Cal.3d 347 [185 Cal.Rptr. 453].)

When Advertising is "Deceptive"

In determining whether an advertisement is deceptive, the test is whether the advertisement has the tendency or capacity to mislead or deceive the audience to whom it is directed. (Chern v. Bank of America (1976) 15 Cal.3d 866, 876 [127 Cal.Rptr. 110].) The statute does not require actual deception, only a tendency or capacity to deceive.

Evaluation Factors: When attempting to determine whether an advertisement is deceptive, one should remember that:

- Ambiguous, partially true, or even literally true statements can be deceptive.
- Industry-wide practices can be deceptive.
- Failure to disclose a material fact can be deceptive.
- Silence or omissions can be deceptive.

Even when none of the statements, considered alone, is misleading, the advertisement as a whole may still be deceptive.

- Subsequent clarification does not prevent the deception.
- The seller's state of mind is not the issue; advertisements placed "in good faith" may nevertheless be deceptive.

Advertiser's Duty of Care

While Section 17500 requires that an advertiser must actually have known, or by the exercise of reasonable care should have known, that a statement was false or misleading, an advertiser need not have consciously intended to deceive. (*Feil v. FTC* (9th Cir. 1960) 285 F.2d 879; see *People ex rel. Mosk v. National Research Company of California* (1962) 201 Cal.App.2d 765, 773 [20 Cal.Rptr. 516, 522] (holding that federal court decisions in this area are "more than ordinarily persuasive").) And if an advertisement is deceptive, it is no defense that an advertiser did not intend to deceive. (*FTC v. Sterling Drugs, Inc.* (2d Cir. 1963) 317 F.2d 669, 674.) The knowledge of lack of due care that constitutes a violation of Section 17500 depends upon the nature of the case. For example:

- The court in *Learner v. Riverside Citrus Association* (1953) 115 Cal.App.2d 544, 545 [252 P.2d 744] stated that if a person "makes such an absolute, unqualified and positive statement as implies knowledge on his part, where he has no knowledge whether his assertion is true or false, and his statement proves to be false, he is as culpable as if he had willfully asserted that to be true which he knew to be false."
- In *People v. Superior Court (Olsen)* (1979) 96 Cal.App.3d 181, 195 [157 Cal.Rptr. 628, 637] cert. den. 446 U.S. 935, a realtor's ad stated that some 400 of its homes listed for sale were sold in 8 days or less, but in fact, some 176 or more were sold in considerably longer periods. The advertiser contended that the discrepancy

was an inadvertent oversight caused by different employees with separate business functions. The court rejected this defense, stating that "[t]he injury to consumers victimized by false or deceptive advertising is no less when it results from negligence than when knowingly or recklessly made."

The advertiser's duty to exercise reasonable care is not satisfied by blind reliance on representations made by others. (*People v. Witzerman* (1972) 29 Cal.App.3d 169 [105 Cal.Rptr. 284].) Thus, Section 17500 imposes a "duty of investigation" and a "duty of communication" on advertisers. And where an advertiser has been put on notice of a possible misrepresentation, the advertiser must investigate and make whatever inquiries are necessary to verify the accuracy of the advertising statement. (*People v. Forest E. Olson, Inc.* (1982) 137 Cal.App.3d 137 [186 Cal.Rptr. 804].)

Who is the Audience?

Both false and misleading advertisements are prohibited under Section 17500. An advertisement is misleading if "members of the public are likely to be deceived" by it. (*Committee on Children's Television v. General Foods Corp.* (1983) 35 Cal.3d 177, 211 [197 Cal.Rptr. 783].) Thus, the focus is on the impact which an advertisement has on the audience's state of mind.

In determining whether a statement has the tendency or capacity to deceive, a court should not consider whether a sophisticated person will be deceived, but whether a trusting consumer, who lacks extensive knowledge, will be deceived. (*Aronberg v. FTC* (7th Cir. 1942) 132 F.2d 165, 167.) Advertisements must be considered as they would be read by those to whom they appeal. (*Ford Motor Co. v. Federal Trade Commission* (1941) 120 F.2d 175, 182.) As one court said: "The law is not made for experts but to protect the public, that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions." (*Aronberg, supra*, at p. 167, citing *Florence Mfg. Co. v. Dowd*, 178 F. 73.) There is no duty on the part of the public to suspect the honesty of those with whom they transact business. (*F.T.C. v. Standard Education Society* (1937) 302 U.S. 112, 116.)

Largely ignoring the California cases that have interpreted Section 17500, a federal court recently concluded that a "reasonable person" standard is appropriate for determining whether an ad is false or misleading under the section. (*Haskell v. Time Inc.* (E.D.

Cal. 1994) 857 F. Supp. 1392.) The Court stated:

"[B]y explicitly imposing a 'reasonable person' standard on advertisers, § 17500 implicitly adopts such a standard for consumers as well; unless particularly gullible consumers are targeted, a reasonable person may expect others to behave reasonably as well." (*Id.* at 1399.)

Total Impression

The total impression left by the entire advertisement must be considered, including both statements which are actually said and assertions which are reasonably implied. (*Aronberg v. FTC*, *supra*, 132 F.2d 162, 167.) Misleading statements which are qualified may still be deceptive if the qualification is not effectively communicated, or is communicated in such a manner as to be less noticeable than the misleading statement. (*Giant Foods, Inc. v. FTC* (1963) 116 U.S. App.D.C. 227, reh'g. den. (1963) 322 F.2d 977, cert. den. (1964) 376 U.S. 967; *In re Sidney Floersheim* (9th Cir. 1963) 316 F.2d 423.)

Omission of Facts

A failure to disclose material facts may cause an advertisement to be deceptive, and the omission may be as misleading as a direct misstatement of facts, where, absent an affirmative disclosure, a consumer is likely to assume something is true, which, in fact, is not true. (*P. Lorillard Co. v. FTC* (4th Cir. 1950) 186 F.2d 423; *Ford Dealers Association v. DMV*, *supra*, 32 Cal.3d 347, 363-364.) The omission must be of something which is material; i.e., a fact which constitutes an important factor in a consumer's decision to buy. (*P. Lorillard Co. v. FTC*, *supra*, 186 F.2d 423.)

Multiple Interpretations

Where an advertisement may be interpreted more than one way by its intended audience, and one of the interpretations is deceptive, the representation is construed against the advertiser, and the advertisement will be deemed deceptive. (*Chrysler Corp. v. FTC* (D.C. Cir. 1977) 561 F.2d 357, 363.)

Permissible Exaggerations

Advertising statements which are merely exaggerations (called "puffery") have been held to be permissible. Since virtually everyone can be presumed to be capable of discounting such statements as "puffery," there is no tendency or capacity to deceive. (*U.S. v. An Article Consisting of 216 Bottles, Sudden Change* (2d Cir. 1969) 409 F.2d 734, 741.) Claims that a product is "exciting," "glamorous," the "best" or even "perfect" may be safe,

depending upon the context. However, if the advertising claim appears to be factually based, lending itself to being objectively analyzed or tested, the claim may not be considered puffery. (*In Re Liggett & Myers Tobacco Co.* (1958) 55 FTC 345, 366.)

Bait Advertising

Bait advertising has been defined as "an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. Its purpose is to switch consumers from buying the advertised merchandise, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser." (16 C.F.R. Part 238 (1990).)

At least two separate statutes deal with bait and switch advertising. Business and Professions Code Section 17500 states that it is unlawful to advertise any property or service "as part of a plan or scheme with the intent not to sell such personal property or services ... so advertised at the price stated therein, or as so advertised." Under the Consumers Legal Remedies Act, it is unlawful to advertise "goods or services with intent not to sell them as advertised." (Civil Code § 1770(i).)

Bait and switch advertising can be carried out in a variety of ways, including using an illustration which lays a foundation for a "switch" by misrepresenting the qualities of the advertised product; refusing to show, demonstrate, or sell, the advertised product; refusing to take orders for the advertised merchandise to be delivered within a reasonable period of time; disparaging the advertised product or its warranty, credit terms, or the availability of repairs or parts or other features; showing a product which is defective, unusable, or impractical for the purposes that are represented or implied in the advertisement; and using a sales plan or method of compensation for sales agents that discourages them from actually selling the advertised product. (16 C.F.R. §§ 238.2(a), 238.3 (1990).)

Duty to Substantiate

In addition to the broad prohibitions against false or misleading advertising contained in Section 17500, another statute deals specifically with advertisements which are apparently factually based. Section 17508 of the Business and Profession Code makes it unlawful for an advertiser to make any false or misleading claims that:

- Purport to be based on factual, objective, or clinical evidence;
- Compare the product's effectiveness or safety to that of other brands or products; or

- Purport to be based on any fact.

The statute authorizes certain law enforcement agencies to require the advertiser to provide evidence of the facts upon which such advertising claims are based, and, if the advertiser fails to respond by adequately substantiating the claim within a reasonable time, the agency may seek injunctive relief and/or may disseminate information to consumers as to the veracity of the claim, or why the claim is misleading.

Consumers Legal Remedies Act

California's Consumers Legal Remedies Act (part of the California Civil Code) prohibits certain deceptive advertising and other practices that result or are intended to result in "the sale or lease of goods or services to any consumer" (Civ. Code § 1770). The act prohibits each of the following:

- Misrepresenting the source, sponsorship, approval or certification of goods or services. (Civ. Code § 1770(b).)
- Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have, or that a person has a sponsorship, approval, status, affiliation or connection which he or she does not have. (Civ. Code § 1770(e).)
- Representing that goods are original or new if they have deteriorated unreasonably, or are altered, reconditioned, reclaimed, used, or secondhand. (Civ. Code § 1770(f).)
- Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another. (Civ. Code § 1770(g).)
- Advertising goods or services with intent not to sell them as advertised, or with intent not to supply reasonably expected demand (unless the advertisement discloses a limitation of quantity). (Civ. Code §§ 1770(i), (j).)
- Making false or misleading statements of fact concerning reasons for, existence of, or amounts of, price reductions. (Civ. Code § 1770(m).)
- Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law. (Civ. Code § 1770(n).)
- Representing that a part, replacement, or repair service is needed when it is not. Representing that the subject of a transaction has been supplied in accordance with a previous representation, when it has not been. (Civ. Code §§ 1770(o), (p).)
- Misrepresenting the authority of a salesperson, representative, or agent to negotiate the final terms of a transaction with a consumer. (Civ. Code § 1770(r).)
- Inserting an unconscionable provision in a contract. (Civ. Code § 1770(s).)
- Selling or leasing goods in violation of the provisions on grey market goods (Civ. Code §§ 1797.8-1797.86). (Civ. Code § 1770(u).)

Regulation of Specific Advertising Practices

Other California statutes prohibit particular kinds of advertising.

Under California's Business and Professions Code, for example:

- It is unlawful for a telephone solicitor or door-to-door salesperson to misrepresent his or her true status or mission for the purpose of making a sale of goods or services. (Bus. & Prof. Code § 17500.3(b).)
- It is unlawful to advertise goods and then refuse to sell to a single purchaser any number of available items demanded by the purchaser, unless the advertisement of the goods discloses that a limit will be imposed. (Bus. & Prof. Code § 17500.5.)
- It is unlawful to advertise as a former price any price that was not, in fact, the "prevailing market price" within the three-month period preceding the advertisement. (Bus. & Prof. Code § 17501.)
- It is unlawful to advertise the price of goods that are sold only in multiple units (e.g., a

dozen eggs) without disclosing the price of the minimum multiple unit that can be purchased (e.g., \$.90 a dozen). (Bus. & Prof. Code § 17504.)

- It is unlawful to in any manner misrepresent the character, extent, volume, or type of the advertiser's business. (Bus. & Prof. Code § 17505.)
- An advertisement that offers more than one product must clearly and conspicuously identify the prices of all products to which the advertisement relates. (Bus. & Prof. Code § 17507.)
- It is unlawful to advertise the price of one product or service whose purchase or lease also requires the purchase or lease of a different product or service, unless the prices of all of the products or services are advertised. For instance, if an advertised camera is sold by the advertiser only *with* a lens, it is unlawful to advertise only the price of the camera *without* the lens that the buyer must purchase. (Bus. & Prof. Code § 17509.)
- It is unlawful to advertise merchandise which is secondhand or used, defective in any manner, or consists of articles or units or parts known as "seconds," or is blemished or has been rejected by its manufacturer as not first class, without conspicuously indicating that the merchandise is secondhand, used, defective, seconds, blemished, or rejected by its manufacturer as not first class. (Bus. & Prof. Code § 17531.)
- It is unlawful for a business that uses a post office box, mail drop, or telephone answering service to advertise the sale of goods or services without including in all advertisements (including any order forms and other promotional materials) the legal name under which the business is conducted and the complete street address from which business is actually conducted. (Bus. & Prof. Code § 17538.5. This section contains exceptions for certain retail outlets open to the public, certain state and local licensees, and certain persons who conduct business out of their home.)
- If an advertised price reflects a manufacturer's cash rebate, and in order to obtain the rebate the consumer must send in a coupon, it is unlawful

to advertise such a price without clearly indicating the price which the consumer must actually pay to the seller. (Bus. & Prof. Code § 17701.5.)

Additionally, under California's Civil Code:

- A seller of goods or services may not offer them for sale by sending or providing such goods or services unsolicited. All goods or services so provided become an unconditional gift to the recipient. If the sender continues to send bills or requests for payment, the recipient may sue for an injunction. (Civ. Code § 1584.5.)

Particular Products and Services

Still other sections of the Business and Professions Code govern the advertising of particular kinds of goods and services. For example:

- Advertising which represents that products have certain desirable environmental characteristics must comply with Section 17508.5.
- Advertising that solicits charitable contributions is subject to Sections 17510.3 and 17510.4.
- Advertising of disassembled toys is subject to Section 17531.1.
- Advertising of TV picture tubes is subject to Section 17531.7.

Basic Federal Law

The major source of *federal* law on false and deceptive advertising is Section 5 of the Federal Trade Commission Act (15 USC § 45(a)(1)), which generally prohibits unfair methods of competition and unfair or deceptive acts or practices.

The 1914 Federal Trade Commission Act was designed to address relations between business enterprises - - mainly to help curb anti-competitive practices -- and its scope still includes "unfair methods of competition." In 1938, the Act was amended to give the Federal Trade Commission a specific *consumer* function by also prohibiting "unfair or deceptive acts or practices in commerce" (15 USC § 45(a)(1).) While the Act only applies to "interstate commerce." (15 USC §§ 44, 45(a)(1)), the concept of "interstate commerce" has been interpreted broadly, covering virtually any transaction with an interstate aspect, however slight (e.g., purely local credit transactions).

Since the mid-1970s, the FTC has implemented the

FTC Act mainly by issuing trade regulation rules, although it has not abandoned other enforcement methods, including administrative proceedings before the Commission. Trade regulation rules define the illegal practices and are the legal basis on which the FTC relies in prosecuting cases. Violation of a rule constitutes an unfair or deceptive act under Section 5 unless the commission provides otherwise in the rule. (See Commerce Clearinghouse, Trade Regulation Reports, Antitrust and Trade Law Enforcement by Federal Trade Commission, ¶ 9500.)

Other portions of the FTC Act specifically regulate the advertising of food, drugs, devices, and cosmetics. (15 USC §§ 69-69j.)

The advertising of credit terms is covered by the federal Truth in Lending Act. (15 USC §§ 1601-1666; Regulation Z, 712 C.F.R. Part 226, § 226.24; Commentary, § 226.24.) Among its many provisions on advertising, Regulation Z states that an advertisement of "specific credit terms" can only express "those terms that actually are or will be arranged or offered by the creditor." Still other acts of Congress regulate the advertising of specific kinds of goods or services -- for instance, cigarettes (15 USC §§ 1331-1341).

Violations and Remedies

Violations of the federal or California statutes on false and deceptive advertising result in a violation of the California statute that prohibits unfair methods of competition and unfair or deceptive acts or practices. Violations of the FTC Act also are subject to the penalty provisions of the California act.

Advertising law violations may be enforced under California Business and Professions Code Section 17200 et seq., which define "unfair competition" to include any unlawful, unfair, or fraudulent business act or practice; deceptive, untrue or misleading advertising; and, any act which is prohibited by the Business and Professions Code's chapter on advertising (Bus. & Prof. Code §§ 17500-17581). The courts apply these statutes to hold unlawful many kinds of unlawful, unfair, and fraudulent business practices, including false and deceptive advertising.¹

The California Attorney General, district attorneys, and some city attorneys, may seek injunctions and other equitable relief under Section 17204, and also may seek civil penalties under Section 17206, for violations of the unfair competition provisions. Most of the enforcement actions under these statutes are maintained by district attorneys and other public law enforcement agencies; the Attorney General closely monitors actions filed by district

attorneys.

In essence, an action under Business and Professions Code Section 17200 et seq., to redress unlawful business practices "borrows" violations of other laws, and treats those violations, when committed pursuant to business activity, as unlawful business practices which are actionable independently under Section 17200 et seq., and are subject to the distinct remedies under those sections. (People v. McKale, supra, 25 Cal.3d 626, 632 [159 Cal.Rptr. 811, 814].)

Private individuals and organizations also can seek injunctive and equitable relief, including restitution **but not damages**, under Business and Professions Code Sections 17203 and 17204, for unlawful, deceptive or fraudulent business practices. (Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 209-210 [197 Cal.Rptr. 783, 790]; Bus. & Prof. Code §§ 17203, 17204.) Thus, organizations, consumer groups, associations, corporations, and individuals all can enforce the laws prohibiting false and deceptive advertising. A person may assert the person's own interests or those of its members, or may act on behalf of the general public, even if the person has not been personally harmed or aggrieved. (Bus. & Prof. Code §§ 17204, 17201; Consumers Union of United States, Inc. v. Fisher Development, Inc. (1989) 208 Cal.App.3d 1433, 1439 [257 Cal.Rptr. 151, 154].)

In order to prove a violation of Business and Professions Code Section 17200, a plaintiff need only prove that the defendant is engaging, has engaged, or proposes to engage in a business act or practice that is either unlawful, unfair, or fraudulent. (Bus. & Prof. Code §§ 17200, 17203, 17206.) A single transaction can constitute a violation of Section 17200. As defined by the California Supreme Court, an "unlawful business practice" includes "anything that can properly be called a business practice and that at the same time is forbidden by law." (People v. McKale (1979) 25 Cal.3d 626, 632 [159 Cal.Rptr. 811, 813-814].)

Deception may be, but is not necessarily, an element of an unlawful business practice. The California Supreme Court has stated that the scope of the term "unlawful" transcends the limits of deception. (Barquis v. Merchants Collection Association Inc., *supra*, 7 Cal.3d 94, 111-112 [101 Cal.Rptr. 745, 757-758].) It is not necessary to prove either actual injury or intent to injure in order to establish that the defendant has engaged in an unlawful business practice. (People v. Cappuccio, Inc. (1988) 204 Cal.App.3d 750, 760, 761 [251 Cal.Rptr. 657, 663, 664]; see Bank of the West v. Superior Court (1992) 2 Cal.4th 1254, 1267 [10 Cal.Rptr.2d 538, 546] (only a showing that members of the public are likely to be deceived is required to state a claim under § 17200 et seq.).)

The only defense to an action based on "unlawful business practices" is that the particular practice is not unlawful under the provision of law which gives rise to the action. (Hobby Industry Association of America, Inc. v. Younger (1980) 101 Cal.App.3d 358, 371-372 [161 Cal.Rptr. 601, 609].) Defenses such as business considerations or lack of fraud or deception, and defenses not aimed at proving the lawfulness of the allegedly unlawful behavior, are completely unavailing. (*Ibid.*) Similarly, a defense that industry-wide practice justifies the challenged conduct also is unavailing. (People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal.App.3d 509, 528 [206 Cal.Rptr. 164, 177].)

Section 17200 also proscribes "unfair" and fraudulent business practices. According to case law, "[A]n 'unfair' business practice occurs when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." (People v. Casa Blanca Convalescent Homes (1984) 159 Cal.App.3d 509, 530 [206 Cal.Rptr. 164, 177], citing FTC v. Sperry and Hutchinson Company (1972) 405 U.S. 233 [92 S.Ct. 898].)

A "fraudulent" business practice occurs when the elements of common law fraud are present. Those elements are: "(1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." (Watts v. Crocker-Citizens National Bank (1982) 132 Cal.App.3d 516, 522 n. 2. [183 Cal.Rptr. 304, 307].) Negligent misrepresentations are included in the definition of fraud. (Blankenheim v. E.F. Hutton & Co. (1990) 217 Cal.App.3d 1463, 1472-1474 [266 Cal.Rptr. 593, 598-599].)

NOTICE: We attempt to make our legal guides accurate as of the date of publication, but they are only guidelines and not definitive statements of the law. Questions about the law's application to particular cases should be directed to a specialist.

Prepared by:

Legal Services Unit

August 1995.

(Editorial revisions, January 1997.)

ENDNOTE

1. Violations of California's advertising law also are actionable in their own right. (Bus. & Prof. Code §§ 17535, 17536 (civil action), §§ 17500, 17534 (misdemeanor prosecution).)